Hepting et al v. AT&T Corp. et al

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UNITED STATES DISTRICT COURT

FOR THE NORTHERN DISTRICT OF CALIFORNIA

SAN FRANCISCO DIVISION

TASH HEPTING, GREGORY HICKS, CAROLYN JEWEL and ERIK KNUTZEN, on Behalf of Themselves and All Others Similarly Situated,,	No. C-06-0672-VRW
Plaintiffs,	**CLASS ACTION**
v.	**PLAINTIFFS' OPPOSITION TO ADMINISTRATIVE MOTION FOR ORDER SHORTENING TIME AS TO AT&T'S MOTION TO DISMISS**
AT&T CORP., et al.,	**[CIVIL L.R. 7-11 AND 6-3(C)]**
Defendants.	Courtroom: 6, 17th Floor Judge: Hon. Vaughn Walker

Dockets.Justia.com

Pursuant to Local Rule 6-3(c), plaintiffs hereby oppose defendants' Administrative Motion to Set Hearing Dates on Defendants' Motions to Dismiss.

The Administrative Motion seeks to accelerate the hearing on the motions to dismiss filed by defendants AT&T Corp. and AT&T Inc., by scheduling hearings on defendants' motions prior to the June 21 hearing set by this Court for plaintiffs' motion for a preliminary injunction and before the first open date on this Court's calendar, currently June 29, 2006.[1] This Administrative Motion should be denied because defendants have failed to provide good cause in support of their request for an expedited schedule and hearing. Instead, the hearings on defendants' motions, along with the hearing on government's announced motion to dismiss, should be set on the next available Law and Motion date, according to the ordinary processes of this Court.

1. Background

This case is a class action brought on behalf of all residential customers and subscribers of defendants AT&T Corp. and AT&T Inc. ("AT&T"), alleging, among other things, that AT&T is violating the Fourth Amendment of the United States Constitution and the federal wiretap statutes by conducting, on behalf of the government, warrantless, suspicionless searches and seizures of the domestic and international communications of millions of Americans.

On March 31, 2006, plaintiffs filed a preliminary injunction motion seeking interim relief on their claims. (Dkt. 16). The preliminary injunction motion presents evidence that the massive suspicionless interception by defendants of many millions of domestic as well as foreign communications is a surveillance program far broader than the one admitted to by the government so far, which is purportedly limited to foreign communications in which there is a reasonable suspicion that either the sender or the receiver is connected to Al Qaeda. The motion also contends that defendants have received no court order or other judicial authorization for this expanded program, and that defendants have received no executive branch authorization that comports with the Foreign Intelligence Surveillance Act, the Wiretap Act, or any other congressionally-

[1] The Motion of Defendant AT&T Corp. to Dismiss Plaintiffs' Amended Complaint (the "AT&T Corp. Motion") and the Motion of Defendant AT&T Inc. to Dismiss Plaintiffs' Amended Complaint (the "AT&T Inc. Motion") will be referred to in this Opposition collectively as the "Motions to Dismiss."

established procedure.

The preliminary injunction motion is supported by evidence including three internal AT&T documents, as well as testimony by a former AT&T employee and by an expert witness who explains how the documents and witness testimony support plaintiffs' claims. On April 26, this Court specially set the preliminary injunction motion for hearing on June 21, 2006, at 10:00 AM. Order Granting in Part AT&T's Motion to Shorten Time (Dkt. 78).

On April 28, defendants filed two Motions to Dismiss. The AT&T Corp. Motion (Dkt. 86) seeks to dismiss the case under various alternative theories of immunity and standing raised under FRCP 12(b)(6). The AT&T Inc. Motion (Dkt. 79) asserts that this Court lacks jurisdiction over AT&T Inc. Also on April 28, the United States government ("DOJ") filed a Statement of Interest pursuant to 28 U.S.C. § 517, stating its intention to intervene and move to dismiss on May 12 on the basis of the state secrets privilege. (Dkt. 82). On May 1, plaintiffs filed a letter brief regarding their request for an order compelling compliance by AT&T with limited discovery on the matters raised by the preliminary injunction motion. (Dkt. 94). Defendants responded on May 2 (Dkt. 103) requesting that the issue be discussed at the May 17, 2006 Case Management Conference set by the Court.

2. AT&T Offers No Proper Basis to Accelerate the Court's Schedule

AT&T has given no reason why it should receive special treatment and jump to the head of the line in the Court's schedule, taking a place on the already-full dates on this Court's Law and Motion calendar. If the AT&T Motions are heard on June 29, the next available Law and Motion date, it will neither substantially prejudice AT&T nor impair judicial economy.

Furthermore, while plaintiffs have been considerate of AT&T's requests to keep to a normal schedule and have not sought to expedite the briefing on the motion for a preliminary injunction, this should not be taken as a sign either that the widespread harms caused by the massive scope of AT&T's illegal conduct are trivial or that plaintiffs do not seek to stop AT&T's illegal activities as soon as possible. Plaintiffs allege that every day, millions of AT&T customers are having their communications illegally diverted and searched, and each day that passes only increases the number of private communications violated.

Moreover, the interaction of the schedule set by the Court for plaintiffs' preliminary injunction motion and AT&T's proposed accelerated schedule for its motions to dismiss would mean that AT&T will have over six weeks to respond to plaintiffs' preliminary injunction motions while plaintiffs would have less than three weeks to respond to AT&T's two motions to dismiss, which together raise numerous legal and factual issues.

While AT&T's administrative motion does not address the putative motions to be filed by the DOJ on May 12, these motions need not change this schedule either. The government proposes to assert the state secrets privilege – an evidentiary privilege. *See United States v. Reynolds*, 345 U.S. 1, 6-7 (1953) ("the privilege against revealing military secrets, a privilege which is well established in the *law of evidence*." (emphasis added)). Until such time as state secrets are in danger of actually being revealed through discovery, the state secret privilege has no application. That threshold event has not yet occurred, and thus, there is no reason or urgency for the government's motion to go forward on the same schedule as the parties' motions.

Finally, plaintiffs would be prejudiced if the Court granted both defendants' request for a June 8 hearing on its two dispositive motions and the government's request that its own dispositive motion be filed on May 12 and heard "in conjunction with" the parties pending motions (Dk. 82-1, page 5:9-11). Taken together, these requests would unfairly require plaintiffs to respond to three complex dispositive motions at the same time.[2]

3. Plaintiffs' Proposed Schedule

Plaintiffs propose the following schedule, incorporating the schedule previously set by this Court with the new motions:

May 18, 2006	AT&T's Opposition to Plaintiffs' Motion for Preliminary Injunction (previously set by the Court)

[2] Indeed, if the government's motion is set for hearing on June 8 along with the defendants as the government seems to request, it would mean that the government's motion is heard on less than the 35 days notice required by Local Rule 7-2(a) and would give plaintiffs less than a week from the filing of the motion on May 12 until their opposition papers are due on May 18.

May 25, 2006	Plaintiffs' Reply to AT&T's Opposition to Preliminary Injunction Motion (previously set by the Court)
June 8, 2006	Plaintiffs' Oppositions to AT&T's Motions to Dismiss
June 15, 2006	AT&T's Replies to Plaintiffs' Oppositions to Motions to Dismiss
June 21, 2006	Hearing on Motion for Preliminary Injunction (previously set by the Court)
June 29, 2006	Hearing on Motions to Dismiss (pursuant to the Court's current law and motion calendar)

The DOJ's motions to intervene and dismiss can be heard at the next available date on the Court's Law and Motion calendar at the time of filing.

4. Conclusion

For the reasons stated above, plaintiffs respectfully request that defendants' Administrative Motion be DENIED.

DATED: May 3, 2006

ELECTRONIC FRONTIER FOUNDATION

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CERTIFICATE OF SERVICE

I hereby certify that on May 3, 2006, I electronically filed the foregoing with the Clerk of the Court using the CM/ECF system which will send notification of such filing to the e-mail addresses denoted on the attached Electronic Mail Notice List, and I hereby certify that I have mailed the foregoing document or paper via the United States Postal Service to the following non-CM/ECF participants:

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